

1 prison appeals coordinator, which document that Plaintiff's two attempts to exhaust his
 2 administrative grievances, filed on March 1, 2005 and July 5, 2005 were "screened out"
 3 at the informal level because they were filed outside of the time limits for filing such
 4 appeals. *See*, Plaintiff's Exhibits in support of Complaint.

5 On May 17, 2006, after reviewing the allegations in the complaint pursuant to 28
 6 U.S.C. § 1915A(a), the Court issued an Order of Service. On October 25, 2006,
 7 Defendant filed a motion to dismiss the complaint pursuant to Rule 12(b) of the Federal
 8 Rules of Civil Procedure, on the ground that plaintiff failed to exhaust administrative
 9 remedies, as mandated by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e.
 10 Plaintiff has filed an opposition and Defendant has filed a reply. Plaintiff has also filed a
 11 motion seeking appointment of counsel (docket no. 14).

12 DISCUSSION

13 A. Standard of Review

14 Nonexhaustion under § 1997e(a) is an affirmative defense under the PLRA.
 15 *Jones v. Bock*, 127 S. Ct. 910, 919 (2007). Defendants have the burden of raising and
 16 proving the absence of exhaustion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir.
 17 2003). A nonexhaustion defense should be raised in an unenumerated Rule 12(b) motion
 18 rather than in a motion for summary judgment. *Id.* In deciding such a motion, the
 19 district court may look beyond the pleadings and decide disputed issues of fact. *Id.* at
 20 1119-20. A prisoner's concession to nonexhaustion is a valid ground for dismissal, so
 21 long as no exception to exhaustion applies. *Id.* at 1120. If the court concludes the
 22 prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal without
 23 prejudice. *Id.* at 1120.

24 The PLRA's exhaustion requirement cannot be satisfied "by filing an untimely or
 25 otherwise procedurally defective administrative grievance or appeal." *Woodford v. Ngo*,
 26 126 S. Ct. 2378, 2382 (2006). "The text of 42 U.S.C. § 1997e(a) strongly suggests that
 27 the PLRA uses the term 'exhausted' to mean what the term means in administrative law,
 28 where exhaustion means proper exhaustion." *Id.* at 2387. Therefore, the PLRA

1 exhaustion requirement requires proper exhaustion. *Id.* "Proper exhaustion demands
2 compliance with an agency's deadlines and other critical procedural rules because no
3 adjudicative system can function effectively without imposing some orderly structure on
4 the course of its proceedings." *Id.* at 2386. (footnote omitted).

5 The State of California provides its prisoners the right to appeal administratively
6 "any departmental decision, action, condition or policy perceived by those individuals as
7 adversely affecting their welfare." Cal Code Regs tit 15, § 3084.1(a). In order to
8 exhaust available administrative remedies within this system, a prisoner must proceed
9 through several levels of appeal: (1) informal resolution, (2) formal written appeal on a
10 CDC 602 inmate appeal form, (3) second level appeal to the institution head or designee,
11 and (4) third level appeal to the Director of the California Department of Corrections.
12 *Barry v Ratelle*, 985 F Supp 1235, 1237 (S.D. Cal. 1997) (citing Cal Code Regs tit 15, §
13 3084.5). A final decision from the Director's level of review satisfies the exhaustion
14 requirement under § 1997e(a). *Id.* at 1237-38. Title 15, section 3084.6(c) of the
15 California Code of Regulations requires that inmates file an inmate appeal within fifteen
16 working days of date of the event or decision being appealed, or of receiving an
17 unacceptable lower level appeal decision.

18 B. Analysis

19 The PLRA amended 42 U.S.C. § 1997e to provide that "[n]o action shall be
20 brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal
21 law, by a prisoner confined in any jail, prison, or other correctional facility until such
22 administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

23 Exhaustion is mandatory and not left to the discretion of the district court. *Woodford v.*
24 *Ngo*, 126 S. Ct. 2378, 2382 (2006) (citing *Booth v. Churner*, 532 U.S. 731, 739 (2001)).
25 Exhaustion is a prerequisite to all prisoner lawsuits concerning prison life, whether such
26 actions involve general conditions or particular episodes, whether they allege excessive
27 force or some other wrong, and even if they seek relief not available in grievance
28 proceedings, such as money damages. *Porter v. Nussle*, 534 U.S. 516, 524, 532 (2002).

1 Here, Defendants correctly raise nonexhaustion in an unenumerated motion to
2 dismiss and argue that Plaintiff's prisoner action should be dismissed because Plaintiff
3 did not exhaust available administrative remedies under § 1997e(a) as to all claims
4 before he filed suit. In support of the instant motion, Defendants reference the two
5 appeals filed by Plaintiff on March 1, 2005 and July 5, 2005, which he included as
6 attachments to the complaint. Defendants further rely on Plaintiff's statements in the
7 complaint that neither of his inmate appeals proceeded beyond the informal level of
8 review in the appeals process and that, as a result, he did not obtain a Director's level
9 decision at the third formal level of review. *See*, Motion to Dismiss at 3.

10 In opposition to the motion, Plaintiff requests the Court to deny the motion and
11 alleges only that he was transferred a number of times as a means of explaining his
12 failure to exhaust the administrative remedies regarding these claims. Additionally, in
13 the complaint signed under penalty of perjury on September 23, 2004 in his initial case,
14 Plaintiff stated that he had not presented the facts underlying the complaint in the
15 grievance procedure because "the issue will just get denied [sic] I am asking for money
16 damages." *See*, Case No. C 05-00180 JSW (PR), Complaint at 2. Plaintiff has conceded
17 that he failed to exhaust the issues underlying the complaint prior to filing the initial
18 complaint. *See Wyatt* at 1120.

19 Plaintiff's attempts at exhausting the claims in early 2005 came long after the
20 fifteen days required for proper exhaustion. The PLRA's exhaustion requirement cannot
21 be satisfied "by filing an untimely or otherwise procedurally defective administrative
22 grievance or appeal." *Woodford v. Ngo*, 126 S. Ct. 2378, 2382 (2006). "Proper
23 exhaustion demands compliance with an agency's deadlines and other critical procedural
24 rules because no adjudicative system can function effectively without imposing some
25 orderly structure on the course of its proceedings." *Id.* at 2386. (footnote omitted). As
26 set forth above, the deadline for filing a written grievance is fifteen days after the date of
27 incident of which one is complaining. The incident alleged in the complaint occurred on
28 September 30, 2003, more than eighteen months before the submission of his

1 administrative appeals in March and July, 2005. As a result, these attempts at filing an
2 administrative appeal do not satisfy the exhaustion requirement because they were
3 untimely. *Id.* at 2382.

4 Plaintiff does not dispute that such administrative remedies were available to
5 inmates at the time of the incident alleged in his complaint. Plaintiff instead requests that
6 the Court find that his attempts to exhaust the claims after the expiration of the time to
7 exhaust them had passed were sufficient. In so doing, Plaintiff relies on case law that is
8 no longer good law. *See Booth*, 532 U.S. at 737, 741; *Ngo*, 126 S. Ct. at 2378.
9 However, the Court is bound by these decisions of the Supreme Court in deciding the
10 motion. Consequently, Plaintiff's complaint will be dismissed without prejudice for
11 failure to exhaust. *See Wyatt*, 315 F.3d at 1119-20 (holding where court finds lack of
12 exhaustion, proper remedy is dismissal without prejudice).

13 MOTION FOR COUNSEL

14 On October 13, 2006, Plaintiff filed a motion seeking appointment of counsel,
15 based on the fact that he is indigent and suffers from mental illness, which makes him
16 sleepy and "forget things, that I read." However, there is no constitutional right to
17 counsel in a civil case unless an indigent litigant may lose his physical liberty if he loses
18 the litigation. *See Lassiter v. Dep't of Social Services*, 452 U.S. 18, 25 (1981); *Rand v.*
19 *Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997) (no constitutional right to counsel in §
20 1983 action), *withdrawn in part on other grounds on reh'g en banc*, 154 F.3d 952 (9th
21 Cir. 1998) (en banc). A court "may request an attorney to represent any person unable to
22 afford counsel." 28 U.S.C. § 1915(e)(1).

23 The decision to request counsel to represent an indigent litigant under § 1915 is
24 within "the sound discretion of the trial court and is granted only in exceptional
25 circumstances." *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984). A finding of
26 the "exceptional circumstances" of the plaintiff seeking assistance requires an evaluation
27 of the likelihood of the plaintiff's success on the merits and an evaluation of the
28 plaintiff's ability to articulate his claims pro se in light of the complexity of the legal

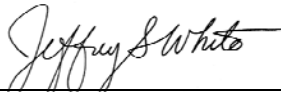
1 issues involved. *See Agyeman v. Corrections Corp. of America*, 390 F.3d 1101, 1103
2 (9th Cir. 2004); *Rand*, 113 F.3d at 1525; *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th
3 Cir. 1991); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). Both of these
4 factors must be viewed together before reaching a decision on a request for counsel
5 under § 1915. *See id.* In this case, Plaintiff has demonstrated sufficient ability to
6 articulate his claims and represent himself in these proceedings. As such, Plaintiff's
7 motion is DENIED (docket no. 14).

8 CONCLUSION

9 For the foregoing reasons, Defendants' motion to dismiss for failure to exhaust
10 administrative remedies (docket no. 12) is GRANTED and the action is DISMISSED
11 without prejudice. The Clerk shall terminate all pending motions as decided by this
12 order, enter judgment and close the file.

13 IT IS SO ORDERED.

14 DATED: June 6, 2007

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17 JEFFREY S. WHITE
18 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JAMES M. MACIAS,

Plaintiff,

v.

SALINAS VALLEY STATE PRISON et al,

Defendant.

Case Number: CV06-00077 JSW

CERTIFICATE OF SERVICE


I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 6, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: June 6, 2007


Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk